BILL 171: THE FIGHTING FRAUD AND REDUCING AUTOMOBILE INSURANCE RATES ACT, 2014

By: Catherine A. Korte

What is an Accident?

Pursuant to s. 3(1) the Statutory Accident Benefits Schedule:

> An Accident means an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device.

In the decision of Vijeyekumar and State Farm Mutual Automobile Insurance Company (1999) O.J. No. 2178 (C.A.), the deceased died of asphyxiation caused by carbon monoxide poisoning. He was found in his car, the engine was running and the hose had been attached to the exhaust pipe which ran to the front console inside the car beside the deceased. The deceased's wife and daughter sued the deceased's automobile insurer for death benefits under his automobile insurance policy. The Court of Appeal determined the applicable test was:

The purpose test: Did the accident result from the ordinary and well-known activities to which automobiles are put?

Causation: Is there some nexus or causal relationship between the death and the use or operation?

The Defences

I There are defences in staged accident cases. These are often as follows:

II The claimant was not involved in the accident;

III The claimant was not injured in the accident; Section 53 termination of the benefit for willful misrepresentation of material facts;

IV Section 31 no requirement to pay under Section 21, 22, and 23 for criminal offences.

Test and Burden

In the decision of *Ibrahim v. Non-Marine Underwriters*, (2003) O.F.S.C.I.D. Lloyds contended that the August 3, 2001 accident was staged in that the applicant was a participant in a staged accident ring. Lloyds questioned the applicant about a number of incidents involving various vehicles and parties that are according to Lloyds connected in various ways to the accident.

The arbitrator found that there were certain common features in the accidents being:

I Mechanics and modus operandi;

V Similar location for the accident;

VI The involvement of rental vehicles in many of the accidents; and

VII The involvement of the owners of housekeeping and auto parts businesses in claims made by the accident participants.

The arbitrator found that these connections and common features appear to be more than coincidental. However, it was determined by the arbitrator that the actions might at least in part be reasonably explained by the evidence that some of the participants were friends and acquaintances from a common homeland, and by the reality that people from common cultural heritages interrelate in their daily business and social lives. The arbitrator found Lloyds would have to prove the existence of a conscious, planned or even conspiratorial element in the interrelationship among the applicant and the others.

However, the Financial Services Commission has become increasingly aware of cases involving fraud and there have been decisions supportive of insurers regarding the burden of proof. In the decision of *Azimi v. Economical Mutual Insurance Company*, FSCO A08-002596 (2010) arbitrator Jessica Kowalski confirmed the applicable test:

> On a claim for payment under an insurance policy, **the claimant has the burden of proving that he or she fits within the scope of coverage.** The situation does not change simply because the insurer challenges the facts upon which the claim is being based.

In this decision Constable Moretti, the investigating officer testified that he found no evidence of contact between the two vehicles. The dust and dirt on the Honda's front bumper was not displaced. There was no debris and the cars were resting in a perpendicular position. The investigating officers found no evidence that the Honda reportedly moving at 50 to 60 km an hour had pushed the Volkswagen at all. It was the engineer, Sam Kodsi's testimony that the VW would have been stationary or rolling at walking speed when it had been struck, but that it had not been struck by Mr. Azimi's Honda.

The Honda's claim history sub search disclosed that the Honda had been involved in at least two prior accidents and had been labelled as salvage some three months before Mr. Azimi purchased it. At the time it was designated as a salvage vehicle, it was registered to Shaw Auto Recyclers, who sold the car to an individual from whom Mr. Azimi then purchased it. Mr. Azimi became the Honda's registered owner on January 23, 2008, just six days before the alleged accident. Meanwhile, the VW had been insured days before the alleged accident (on January 18, 2008) and that insurance policy was only for 30 days. Arbitrator Kowalski found:

I find Mr. Kodsi's evidence compelling on three main points:

1. that had a collision occurred as reported, the cars would have rotated in the intersection;

2. that crush to the Honda would be expected; and

3. finally, the crush on the VW would have been double than that measured. **I agree with Economical that I do not have fit nod that Mr. Azimi engaged in a fraud in order to find that he was not involved in an "accident", as defined by subsection 2 (1) of the Schedule.** While I certainly have insufficient evidence to find fraud on the part of Mr. Azimi, I am not satisfied that an "accident" occurred as Mr. Azimi had alleged.

Treatment Facility, Fraud and Unfair Practices

The HCAI PCT Pilot Program indicated 14% of psychologists found that their credentials were being used by unrecognised clinics.

The Toronto Star's July 13, 2011 article indicates Dr. Husnani (D.C.) discovered in 2010 that her signature was being used on hundreds of fake invoices submitted by various clinics.

What to do?

I Look for signs of forgery/alteration on treatment plans and applications;

II Determine who is providing the treatment plan services;

III Request attendance records;

IV Conduct an EUO;

V Complain to a college.

The Toronto Star article of July 13, 2011 indicated Steve Moustakas had been sent to Osler Rehabilitation by a paralegal firm. His insurer continued to be billed for services for months after he discontinued treatment. His insurer was charged for dental and psychological examinations, which never occurred. George Antoniadis was charged for more than $6,000 worth of treatment when all he had received was a "magic vibro belt" device.

In the decision of *Chung v. Intact* (July 11, 2012), there were uncorroborated invoices for treatment provided to the insurer. The claimant could not recall the exact dates nor were providers tendered as witnesses. Arbitrator Wilson held:

> It must be remembered, however, that despite the hints of the practices of certain treatment providers in flooding insurers with treatment plans and Section 24 expenses, no treatment provider is a party to this arbitration. The insured and claimant is Mrs Chung alone.

In the decision of *Aweys v. Intact* (March 19, 2012), Intact applied a stay of arbitration proceedings on the basis that it had sued for treatment facilities for treatment fraud. Arbitrator Feldman acknowledged the importance of insurers fighting perceived abuses in the accident benefits system, but noted that his discretion to stay the proceedings required more evidence than presented. Arbitrator Feldman dismissed the insurer's motions on the grounds that the insurer failed to establish on the balance of probabilities that it would suffer irreparable harm if the motion was not granted, or that allowing the case to proceed on its merits would constitute an abuse of process.

In the decision of *Intact and Chung*, FSCO A10-002750 (2012) the insurer had received 41 OCF-22s and paid around $121,000 for assessment costs to date. The application for arbitration listed 38 further claims ranging from $63.72 to $2,463.72. Although the applicant initially proposed calling some of the treatment providers and assessors, none were called on her behalf. Rather, one appeared for cross-examination at the instance of the insurer. An example of treatment claims were the relaxation CDs provided by Dr. Steiner for which Intact was billed. The applicant had no specific recall of Dr. Steiner. The CDs consisted largely of just spoken words in English which Arbitrator Wilson indicated there was no explanation of how such would be of use to a unilingual Cantonese speaker. The documentary records relating to the treatments given did not satisfy him on a balance of probabilities that each and every proposed treatment was reasonable and necessary. Given the generalised scope of the errors and misstatement in the billings and supporting documentation he was unable to find any credible supporting evidence that the claims for further treatment contained in the application for arbitration had any validity.

Be Aware and Be Prepared. And always remember that the Best Defence is a good Offence.